No. 86-1654

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PAUL ROBINSON, *et al.*,

Petitioners,

v.

STATE OF NEW JERSEY, *et al.*,

Respondents.

JOSEPH W. ANTONACCI, *et al.*,

Petitioners,

v.

STATE OF NEW JERSEY, *et al.*,

Respondents.

ALLEN OLSEN, *et al.*,

Petitioners,

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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April 14, 1987

QUESTIONS PRESENTED

I Are public-sector employees' First Amendment rights, under *Chicago Teachers Union v. Hudson*, 106 S. Ct. 1066 (1986) and other precedents of this Court, violated by a state law which as written, interpreted, and applied requires those employees to pay for union activities other than collective bargaining and contract administration?

II Is the Court of Appeals' holding that no irreparable harm occurs to employees through a union's collection and expenditure of those employees' monies for activities other than collective bargaining and contract administration consistent with *Hudson*, and other precedents of this Court?

III Are public-sector employees' First Amendment rights to an impartial tribunal, under *Hudson*, 106 S. Ct. 1066 (1986) and other precedents of this Court, violated by the Court of Appeals' holding that the employer representative is the employees' "counterbalance" to the union's representative on a tripartite panel composed of union, employer, and public representatives, but no employee representative?

IV Are public-sector employees denied a federal forum for their First Amendment and Civil Rights Act claims by abstention under *Pullman* years after their complaints were filed, where the full record necessary to decide those claims was presented to the district court; where state law is clear; and where claims must be presented to two administrative agencies; and where there is no rule providing for questions to be certified to the state's supreme court?

PARTIES TO THIS PROCEEDING

PLAINTIFFS

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Allan Roth
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Jackson Toby
Clifford Owens
Calvin W. Corman
Arnold Glass
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DEFENDANTS

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

INTRODUCTION

Paul Robinson *et al.* hereby petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit to review that court's decision and judgment in *Robinson v. State of New Jersey*, 806 F.2d 442, reprinted in the Appendix hereto (App.) at 4a.

OPINIONS BELOW

The subsequent decision of the Court of Appeals, denying the Petitioners' Motion for Panel and *En Banc* Reconsideration, with one judge dissenting, is unreported and is reprinted in App. at 1a.

The bench opinion of the District Court immediately preceding appeal to the Court of Appeals is unreported and is reprinted in App. at 29a.

Prior decisions of the District Court, the last granting a preliminary injunction, are reported and included in the Appendix as:

> *Robinson v. State of New Jersey*, 547 F. Supp. 1297 (D.N.J. 1982), App. at 204a;
>
> *Olsen v. Communications Workers*, 559 F. Supp. 754 (D.N.J. 1983), App. at 158a; and
>
> *Robinson v. State of New Jersey*, 565 F. Supp. 942 (D.N.J. 1983), App. at 137a.

The prior decision of the Court of Appeals abating the preliminary injunction is reported and included in the Appendix as:

> *Robinson v. State of New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1228 (1985), App. at 79a.

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1986, and a timely petition for rehearing and rehearing en banc was denied on January 14, 1987. This Court has jurisdiction to review the judgment of the Third Circuit under 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this petition include the First and Fourteenth Amendments to the United States Constitution, the Civil Rights Act of 1875, 42 U.S.C. § 1983, and the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-2, -3(e), -5.3 and the 1980 "Representation Fee" Amendments thereto. The texts of these provisions are reprinted beginning at App. at 270a.

STATEMENT OF THE FACTS

Petitioners are New Jersey public-sector employees. As relevant, their employment is governed, in primary part, by the New Jersey Public Employer-Employee Relations Act (Act).[1] The Act was amended in 1980 (Fee Amendments)[2] to require employees subject to its terms to pay "representation fees" to unions which are their "exclusive representative." Under the Fee Amendments, fees are to be no more than 85% of a voluntary member's dues. The Fee Amendments exempt only two categories of union

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[1] New Jersey Statutes Annotated 34:13A-2, -3(e), -5.3, App. at 273a.

[2] Representation Fee Amendments to the E.R.A., N.J.S.A. 34:13A-5.5, -5.6, App. at 278a.

expenditures from the representation fee: "benefits available only to members" and "activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment."[3]

The Fee Amendments condition a union's receipt of representation fees upon the existence of a "demand and return" scheme. The "demand and return" schemes of the unions in this case employ the Fee Amendments' standard.[4] An Appeal Board, composed of union, employer, and public representatives (but no representative of non-union employees) is to consider employees' appeals of the fee amounts unilaterally determined by union demand and return schemes.[5]

The State of New Jersey has made no attempt in the Fee Amendments themselves, relevant union demand and return schemes, state Public Employment Relations Commission decisions, or either set of proposed post-*Hudson* regulations published by the State for comment, to require public-sector unions, at any time, before or after collection demands, to establish the costs of "collective bargaining and contract administration."

New Jersey employees attempting to exercise their First Amendment right to be free from forced subsidization of unions' non-bargaining activities have been met in this case with the implacable opposition of both the

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[3] Fee Amendments § 34:13A-5.5c, App. at 278-79a.

[4] Typical of the demand and return schemes of the respondent unions is the scheme of the American Association of University Professors which tracks the language of the Fee Amendments. This is discussed in the District Court's opinion in Robinson v. New Jersey, App. at 211a.

[5] Fee Amendments, § 34:13A-5.6, App. at 280a.

public employer and unions involved, as the District Court found in one of the cases:

> It is quite apparent from the evidence that plaintiffs' activities when opposing the representation fee were consistent with previously permitted conduct by State employees on State property. Most of these activities took place before work or during breaks or lunch hours. . . . [T]he State has agreed that one group of employees (members of CWA) may express themselves on bulletin boards and through the distribution of literature, while non-members may not enjoy the same privilege.
>
> I find that the sole reason plaintiffs were directed to cease their activities on behalf of the Committee for a Rational Representation Fee and were threatened with discipline was because of the ideas and policies which they advocated. Their activities in no way interfered with their work and in no way intruded upon other employees. *The State, apparently at the instigation of the union*, sought to prevent expression of the views and policies espoused by plaintiffs.[6]

The record shows that prior to filing suit, Petitioners repeatedly sought, by various means, to vindicate their First Amendment right to avoid subsidizing unions' non-bargaining activities. Their requests of their state employer were deflected; the employer disclaimed responsibility and referred the employees to the unions involved.[7] Employees' requests to the unions for information were denied by statements such as "under no circumstances are we required to provide you with Association financial records."[8]

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[6] Olsen v. Communications Workers, App. at 185-86a. (Emphasis added.)

[7] Letter of Robert D. Sullivan to Joseph Antonacci, App. at 319-20a.

[8] Letter of David T. Dierker to Thomas Gay, App. at 316-17a.

Employees' efforts to obtain redress from the unions themselves, pursuant to the Fee Amendments' "demand and return" schemes, received an outright hostile reception; extensive correspondence resulted in one union president advising the employee that he would "have to sue."[9] The unions' overall attitude toward the Petitioners is reflected in contemporaneous publications which labeled them as "freeloaders" and "parasites."[10]

STATEMENT OF THE CASE

Petitioners' cases were separately filed as *Robinson v. State of New Jersey* (and the American Association of University Professors); *Antonacci v. State of New Jersey* (and the National Education Association); and *Olsen v. Communications Workers of America* (and the State of New Jersey). The suits were filed on various dates in 1982 under the Civil Rights Act of 1875, 42 U.S.C. § 1983.

Three District Court decisions entered below are reported. They are *Robinson v. State of New Jersey*, 547 F. Supp. 1297 (D.N.J. Sept. 28, 1982), App. at 204a; *Olsen v. CWA*, 559 F. Supp. 754 (D.N.J. March 16, 1983), App. at 158a; and *Robinson v. State of New Jersey*, 565 F. Supp. 942 (D.N.J. June 15, 1983), App. at 137a. The last decision granted the Petitioners in all three cases a preliminary injunction that the New Jersey statutory "demand and return" scheme impermissibly burdens First Amendment rights.

The June 15, 1983 decision and order were appealed to the Third Circuit Court of Appeals. That court (2-1,

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[9] Letter of Thomas Gay to Thomas A. Farr, App. at 322a.

[10] "Agency Shop: Its time has come," App. 306a, 310a.

Judge Sloviter dissenting) abated the injunction and remanded for further proceedings "consistent with the opinion." That decision is reported as *Robinson v. State of New Jersey*, 741 F.2d 598 (1984), *cert. denied*, 105 S. Ct. 1228 (1985), App. at 79a.

On remand, the District Court, considering itself bound to follow the Circuit Court's decision on preliminary injunction, though expressing reservations, granted the unions' motion for summary judgment for reasons expressed in a bench opinion on June 28, 1985.[11] Summary judgment was granted in favor of defendants, insofar as plaintiffs asserted First Amendment and due process challenges to the constitutionality of the Fee Amendments as written and implemented; and the court abstained from deciding the "as applied" constitutional issues under *Pullman*.[12]

On the specific issues raised before the Third Circuit Court of Appeals, the District Court decided: that the Fee Amendments on their face do not violate the First Amendment by permitting a "representation fee" to be collected that exceeds the costs of collective bargaining; that "demand and return" schemes which permit an excess collection, and then provide only the post-taking return of monies unlawfully collected, are sufficient under the First Amendment; that relegating employees, in the first instance, to the adversary unions' own "demand and return" schemes does not violate the First Amendment; that the "as applied" constitutional issues should be deferred; and that the Fee Amendments' pro-

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[11] App. at 30a.

[12] Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941).

vision for a pre-judicial forum, composed of union, employer, and public representatives, but no representative of objecting non-union employees, to resolve fee disputes, does not violate due process of law under the Fourteenth Amendment.[13]

As to each point raised before it, the Court of Appeals affirmed the District Court. In so doing, the court overlooked or ignored Petitioners' "as applied" challenges to the Fee Amendments and the "demand and return" schemes the unions operate under color of that law. It sustained *Pullman* abstention even though a complete record had been compiled in the District Court, even though the Fee Amendments as written and uniformly interpreted and applied by New Jersey employ a standard of chargeability and proof rejected by this Court in *Hudson*, even though New Jersey has no procedure to certify questions to the New Jersey Supreme Court and thereby substantially reduce delays attending *Pullman* abstention, and even though no single state forum is available for the prompt resolution of state law issues. And the court sustained the tripartite structure of the Appeal Board, which has union, employer, and public representatives, but no nonunion employee representative, on the basis that the employer representative must be accepted as the employees' "counterbalance" to the union representative.[14]

SUMMARY OF REASONS FOR GRANTING WRIT

The decision below is far reaching in its holdings and implications. Its sweeping conclusions are, for the most part, without supporting citation of any kind, and are

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[13] Bench opinion, App. at 30a.

[14] App. at 5a.

flatly contrary to applicable precedent of this Court. They also conflict with decisions of the Third Circuit, decisions of other Circuits, and decisions of District Courts. Unsupported, and we believe unsupportable, are the Court of Appeals' conclusions that: collecting monies from nonunion employees in excess of the union's costs of collective bargaining and contract administration, in that court's own language, presents no "question of a chilling effect on expressive activity";[15] nonunion employees who have no designated representative on the statutory Appeal Board which is composed of designated union, employer, and public representatives, are nevertheless adequately represented because, in the court's language, the union representative is "counterbalanced by the employer representative";[16] and that *Pullman* abstention is appropriate 2 1/2 years into Federal Court litigation, after the state statute had been construed by the District Court and after the parties had developed a record consisting of thousands of pages of materials necessary to consider and decide Federal Constitutional questions, and even though the state law, as relevant to the First Amendment questions, has been definitively and uniformly construed within the state system, and even though that system relegates nonunion employees to multiple forums for resolution of those claims. The writ should issue to insure that the decision below does not distort and burden the First Amendment substantive and procedural rights of nonunion employees established by this Court's *Abood*[17] and *Hudson*[18] decisions.

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[15] App. at 14a.

[16] App. at 20a.

[17] Abood v. Detroit Bd. of Education, 431 U.S. 209 (1977).

[18] Chicago Teachers Union v. Hudson, 106 S. Ct. 1066 (1986).

The Respondent unions argued below that this Court's *Hudson* decision "merely adds another layer of confusion to what was already a mass of uncertainty."[19] Petitioners do not so view this Court's 9-0 *Hudson* decision. However, if the Respondent union's view is correct, this Court should certainly grant certiorari to clear up that uncertainty, as well as to rectify the injustices created by the decision below.

REASONS FOR GRANTING THE WRIT
I EMPLOYEE IMPACT

The most current available figures show that there are about 13.0 million state and local government employees overall;[20] there are 4.9 million "organized" state and local government employees throughout the United States;[21] each such organized employee may be considered a "potential objector" under this Court's *Hudson* decision.[22] Within the Third Circuit, in New Jersey there are approximately 418 thousand public employees and approximately 235 thousand organized employees; in Pennsylvania there are approximately 532 thousand public employees and approximately 286 thousand organized public employees;[23] and other states, such as California, have public-sector statutes virtually the same as that of New Jersey.[24] Thus, the number of employees

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[19] The relevant page of their brief is reprinted, App. at 314a.

[20] 1982 Census of Governments, Labor-Management Relations in State and Local Governments, Vol. 3, p. 1 (U.S. G.P.O. June-Oct. 1984).

[21] Id.

[22] *Hudson* at 1076.

[23] Census of Governments, supra, n.20, at 17 and 21.

[24] California State Employer-Employee Relations Act Title 1 Division 4 of the Government Code, Sec. 3512 et seq.

directly affected by the decision is substantial, the number indirectly affected is even greater, and the number potentially affected nationwide is very large indeed.

II DIVERGENT STATUTORY STANDARDS

Statutes governing employee-employer-union relationships are numerous and proliferating. The approaches embodied in their provisions on the representation fee issue differ markedly. Some require that nonmembers pay unions' full dues.[25] Other statutes require payment of collective bargaining costs.[26] Still other statutes, such as the Fee Amendments here, require 85% of dues.[27] The point of this case, and one the Court of Appeals missed, is that, irrespective of variations in statutory provisions, the First Amendment rights of all these laboring public-sector employees are the same.

III THE DECISION BELOW DENIES PETITIONERS AND OTHER PUBLIC-SECTOR EMPLOYEES THE FIRST AMENDMENT RIGHT ESTABLISHED UNDER *HUDSON* AND OTHER PRECEDENTS OF THIS COURT TO PAY SOLELY FOR THE UNIONS' COSTS OF COLLECTIVE BARGAINING AND CONTRACT ADMINISTRATION

Hudson follows an established line of decisions of this

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[25] Chapter 150E § 12 of the Massachusetts General Laws on its face requires a service fee equal to the amount required to be a union member, with a post-collection rebate.

[26] See generally 1 Pub. Employee Bargaining Rep. (CCH) ¶ 200.30.

[27] See n.24, supra.

Court holding that employees can be required to finance only the collective bargaining and contract administration functions of the union that is their exclusive representative. Cases which establish the private-sector standard, under the Railway Labor Act, are *Street*,[28] *Allen*,[29] and *Ellis*.[30] Public-sector cases with equivalent holdings are *Abood*[31] and *Hudson*.[32] In the latter case the Court reiterated that, consistent with the Constitution, employees can be required only "to pay a fair share of the union's cost of negotiating or administering a collective-bargaining agreement."[33]

That protective standard, designed to nurture First Amendment freedoms, is *not now available* to New Jer-

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[28] Machinists Union v. Street, 367 U.S. 740, 763 (1961) (The statute "contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes.") See also, Railway Employes' Department v. Hanson, 351 U.S. 225, 235 (1956) ("The financial support required relates . . . to the work of the union in the realm of collective bargaining.")

[29] Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113, 122 (1963) ("[T]he unions' right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining . . .. ")

[30] Ellis v. Railway Clerks, 466 U.S. 435, 448 (1984) ("[O]bjecting employees may be compelled to pay their fair share of . . . undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.")

[31] *Abood*, supra, n.17 at 226 ("Thus, insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, [*Hanson* and *Street*] appear to require validation of the agency shop agreement before us.")

[32] Supra, n.18.

[33] Id. at 1073.

sey public-sector employees. The Fee Amendments on their face employ no standard of chargeability at all. Rather there is a standard of nonchargeability, i.e. members-only benefits and partisan political and ideological causes unrelated to collective bargaining.[34] The New Jersey standard is, quite plainly, not the obverse of the *Hudson* standard, and proof sufficient under the Fee Amendments plainly does not suffice under the First Amendment.

Even if it were abstractly possible to interpret the Fee Amendments in a manner consistent with the First Amendment,[35] that has not been done in New Jersey. The unions' demand and return schemes,[36] state administrative decisions,[37] two sets of post-*Hudson* proposed administrative regulations,[38] and the New Jersey Supreme

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[34] Thus, the Fee Amendments explicitly contain the vice *Hudson* at 1076 held to be unconstitutional. "Instead of identifying the expenditures for collective bargaining and contract administration . . . the Union identified the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers."

[35] This Court's precedents would not permit so bizarre an interpretation of the Fee Amendments. "[T]his Court . . . must not and will not carry [statutory interpretation] to the point of perverting the purpose of a statute . . . ." Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964).

[36] Supra, n.4.

[37] District 65, United Auto Workers v. Bacon, Docket No. CI-85-70-153, New Jersey Public Relations Commission (issued December 23, 1986) goes so far as to misstate the Court's *Hudson* standard as "ideological or political purposes unrelated to collective negotiations or contract administration." Id. at 13.

[38] New Jersey has proposed in sequence two sets of post-*Hudson* rules. The first was published for comment as proposal number PRN 1986-295, 18 N.J.R. 152, (Aug. 4, 1986). The second was published for comment as PRN 1987-41, 19 N.J.R. 196 (January 20, 1987). Significantly, the

(continued)

Court's *Kramer*[39] decision uniformly adhere to the negative "nonchargeability" standard. Thus, there is no room now for a saving interpretation.

This condemns Petitioners, and others, to precisely the perpetual litigation sequence from which *Hudson* promises the First Amendment holds them harmless. Moreover, the New Jersey standard precludes the assembly and presentation of evidence of the collective bargaining nexus, if any, of union activities: Only evidence as to the union's members-only and partisan political and ideological activities is deemed relevant in a New Jersey representation fee case. Thus, employees are denied an evaluation at the trial level of any evidence against the *Hudson* standard, and they are denied the record that would permit scrutiny of the evidence against that same standard by appellate courts, and, if necessary, this Court. The situation, as is evident, is so bizarre that it should be subject to mandamus on the basis of frustrating appellate jurisdiction. Thus, despite *Hanson*, *Street*, *Ellis*, *Abood* and *Hudson*, employees in New Jersey must run the gauntlet of appeals on the law, then, presumably after remand, appeal again on the facts and the law. They

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proposal discussed in the decision below, App. at 13-14a, *has been abandoned, and the new proposal deletes the requirement* that unions' *Hudson* disclosure notice provide "those expenditures which are chargeable to persons paying the representation fee in lieu of dues . . . ." Compare § 19:17-3.3(a)1 of the two proposals.

[39] Boonton Bd. of Education v. Kramer, 99 NJ 523, 544 (1985), cert. denied, 106 S. Ct. 1388 (1985), explicitly holds that the plain statutory language of exclusion without more, "correctly applies the principle recognized in *Abood* and *Ellis* that fees exacted from nonunion members of the bargaining unit cannot be used to support political or ideological expenditures not adequately related to collective bargaining and conditions of employment."

cannot appeal once on both, as is typically done, and, for them and similarly situated employees nationwide *Hudson* is a false promise.[40]

IV THE DECISION BELOW IS CONTRARY TO *HUDSON* AND OTHER FIRST AMENDMENT PRECEDENTS OF THIS COURT IN HOLDING THAT NO IRREPARABLE HARM OCCURS WHEN UNIONS COLLECT FEES FROM NON-UNION EMPLOYEES FOR ACTIVITIES OTHER THAN COLLECTIVE BARGAINING AND CONTRACT ADMINISTRATION

The court below concluded that, "Because the statute in question threatens no sanctions, there does not appear to be any question of a chilling effect on expressive activity."[41] But the fact that fee collection occurs through automatic payroll deduction rather than threats of discharge does not eliminate "chilling effects." The Court of Appeals' conclusion simply ignores the thrust of the *Hudson* decision, which took pains to point out the First Amendment imperative to avoid just such chilling effect by providing relief *prior to* the "deduction",[42] "collection",[43] or "exaction"[44] of any representation fees what-

[40] We are constrained to point out that *Abood*, decided by this Court in 1977, was only recently settled in 1987; *Hudson*, decided by this Court in 1986, is still pending in the District Court, unresolved. Thus, the expeditious and fair resolution of these cases is elusive, even following *Hudson*.

[41] App. at 14a.

[42] *Hudson* at 1070. *Hudson* itself is a "deduction" case.

[43] Id. at 1078.

[44] Id. at 1075.

soever. This Court's repeated use of such terms derived from the First Amendment necessity of "precision of regulation"[45] is clearly intended to avoid even the potential for chilling effect. The actual chilling effect is manifest in the record of this case.[46] Where the First Amendment infringement occurs through automatic deduction, rather than threats of discharge, the chilling effect is not potential, but actual. How many employees will assert their right to not subsidize the union's non-bargaining activities after the monies have been automatically taken from them and turned over to the union? The Court of Appeals' conclusion also ignores *Elrod v. Burns*[47] which holds, "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[48] Thus, the decision below violates the direct holding of *Elrod* and the necessary (and one would have thought inevitable) holdings of *Hudson.*

V PUBLIC-SECTOR EMPLOYEES' *HUDSON* RIGHT TO AN IMPARTIAL DECISIONMAKER IS VIOLATED BY THE HOLDING BELOW THAT THE EMPLOYERS' REPRESENTATIVE ON THE APPEAL BOARD IS THE EMPLOYEES' "COUNTERBALANCE" TO THE UNIONS' REPRESENTATIVE ON A TRIPARTITE PANEL COMPOSED OF REPRESENTATIVES OF UNIONS, EMPLOYERS AND THE PUBLIC, BUT WHICH HAS NO EMPLOYEE REPRESENTATIVE

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[45] *Hudson* at 1074, n.11.

[46] The record is replete with documents showing the Respondent unions' nonbargaining spending.

[47] 427 U.S. 347 (1976).

[48] Id. at 373.

The decision below implicitly concedes the necessity for nonunion employees to have their own representative on the Appeal Board and that no such representation is provided by the Fee Amendments.[49] Inexplicably however, the Court of Appeals rationalizes that flaw in the system by concluding that the fundamental interests of public employers and nonunion employees are so similar that the public employers' Board member must also be accepted by the nonunion employees as their representative on the Appeal Board. In the language of the court below, the public employer Board member is the nonunion employees' "counterbalance" to the unions' own representative on the Board.[50]

That proposition is rendered false on the facts of this case, which show that public employers and unions actually teamed up to suppress nonmember employees' First Amendment rights regarding representation fees.[51] Such a proposition also defies the history of labor legislation in this country, which outlaws the "company union" and mandates collective bargaining through exclusive representatives precisely because of the legislative judgment—never challenged by any court—that conflicts are inherent in the relationship between employers and employees.[52] Moreover, such a proposition is rejected by the

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[49] App. at 280a. Rather the Fee Amendments provide for designated union, employer, and public representatives, but *no representative for nonunion employees.*

[50] App. at 20a.

[51] There is no basis in Judge Debevoise's finding, App. at 185-86a, for concluding that employers are nonunion employees' surrogates on these issues.

[52] 29 U.S.C. § 158(a)(2) makes employer support of unions unlawful.

New Jersey Act itself, which makes unions, and not employers, the employees' exclusive representatives.[53] But more fundamentally, the Court of Appeals' proposition, if true, would render void even under a rational basis test, and surely under the compelling interest test, statutory provisions which make unions, and not employers, the exclusive representatives of employees, and which require employees to pay those unions the costs of negotiations with employers.[54]

A THE UNCONTRADICTED RECORD HERE SHOWS THAT EMPLOYERS' RELEVANT INTERESTS ARE ALIGNED WITH THOSE OF UNIONS, NOT EMPLOYEES

The record here demonstrates beyond any doubt whatever that public employers and nonunion employees have opposing interests on the representation fee issue; it also shows that the interests public employers have on this issue are closely aligned with those of unions. New Jersey public employers at the behest of unions even discipline employees who communicate among themselves on their own time concerning the representation fee issue' and spurn valid complaints from employees on that issue. This is confirmed and summarized in the District Court's finding that the employers and unions collaborated to suppress nonmembers' First Amendment rights on this very issue.[55] There is, then, no factual support

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[53] App. at 275a.

[54] The compelling interest test clearly applies to First Amendment cases such as this one. Federal Election Commission v. Massachusetts Citizens for Life, 107 S. Ct. 616 (1986).

[55] See the District Court's *Olsen* opinion, supra, n.51.

in this record for the Court of Appeals' proposition that employers' interests on this issue are essentially the same as those of nonmember employees. To the extent the court below found that on the representation fee issue employers and nonunion employees' interests are the same, the decision has no source in, and is contradicted by, the record.[56]

B THE STATUTES AT ISSUE HERE ARE PREMISED ON A CONCLUSION CONCERNING EMPLOYEE REPRESENTATION THAT IS OPPOSITE TO THAT OF THE COURT OF APPEALS

The New Jersey Act makes the union, and not the employer, the employees' "exclusive representative,"[57] and from that status accords the unions the right to a fee from represented employees. As exclusive representatives, unions negotiate with employers on employees' behalf; employers do not negotiate with unions on behalf of employees.[58]

It is, therefore, anomalous for the statute to provide for unions to be employees' representatives in dealing with employers, and for the court to make the employer the employees' representative for dealing with unions. It is an anomaly, not found in the language or legislative history of the statute itself, for which the court below

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[56] Remarkably, no party urged the erroneous "counterbalance" theory on the court below.

[57] App. at 275a.

[58] This proposition is self-evident; we are compelled to state it here because of the contrary view of the Court of Appeals.

provides neither explanation nor source.[59] And it is an anomaly that creates and then leaves unresolved impairments of employees' First Amendment and Fourteenth Amendment rights and liberties.[60]

On the basis of the employer's actions toward employees shown by the record here, the operating assumptions of 50 years of labor law, and the operating assumptions of the very statutes here for construction, the Court of Appeals' proposition that employers represent employees is simply wrong.[61] And the consequence of the court's decision is to invalidate the premise for "exclusive representation" upon which labor statutes in this country are universally premised.

VI PUBLIC-SECTOR EMPLOYEES ARE DENIED A FEDERAL FORUM FOR THEIR FIRST AMENDMENT AND CIVIL RIGHTS ACT CLAIMS BY ABSTENTION UNDER *PULLMAN* YEARS AFTER THEIR COMPLAINTS WERE FILED: WHERE THE FULL RECORD NECESSARY TO DECIDE THOSE CLAIMS WAS PRESENTED TO THE DISTRICT COURT;

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[59] Neither the language nor legislative history of the Act or the Fee Amendments, App. at 273a and 278a, provide any basis whatsoever for the court's view.

[60] The court's unsupported conclusion denies employees the "impartial decisionmaker" that is their right under *Hudson* at 1078.

[61] The decision is contrary to this Court's decision in Glover v. St. Louis-San Francisco Ry. Co, 393 U.S. 324, 329 & 332 (1968); it is also contrary in principle to both Associated Plumbing & Mechanical Contractors v. Local 447, 48 Daily Labor Report E-1, E-3, March 13, 1987 (9th Cir. Feb. 23, 1987) and Semancik v. United Mine Workers, 466 F.2d 144, 151 (3d Cir. 1972).

WHERE STATE LAW IS CLEAR; AND WHERE CLAIMS MUST BE PRESENTED TO TWO ADMINISTRATIVE AGENCIES; AND WHERE THERE IS NO RULE PROVIDING FOR QUESTIONS TO BE CERTIFIED TO THE STATE'S SUPREME COURT

These cases were filed in District Court in 1982, more than four years prior to the decision below, and more than two and one-half years prior to entry of the preliminary injunction by the District Court. A complete record was compiled there which is reflected, in part, in the joint appendix submitted to the court below of 1201 pages. Two published opinions were issued and a preliminary injunction entered. The Court of Appeals issued its own decision which vacated the preliminary injunction. *Only following these events and on remand was abstention ordered.* The record includes every piece of information necessary for the District Court, the Court of Appeals, and this Court to decide the *Hudson* validity of the Fee Amendments on their face and as applied, and of Respondent unions' demand and return schemes as written and as applied. This Court has instructed that an appellate court must "review the legality of the practice defended before the District Court"[62] and insure "expeditious, fair"[63] consideration. Abstention on *Pullman* grounds, under the decision below, would require assembly and consideration of a record in state administrative proceedings duplicating the one present in federal court, denying "fair and expeditious" consideration.[64]

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[62] *Hudson* at 1075, n.14.

[63] Id. at 1076.

[64] Lehnert v. Ferris Faculty Assn., 556 F. Supp. 309, 314 (W.D. Mich. 1982), denied abstention on precisely this ground.

Abstention here will not eliminate or alter the Fee Amendments' provisions. The law itself plainly has language antithetical to *Hudson*; only impermissibly torturing the language beyond recognition would yield a "reading" consonant with the First Amendment. And the New Jersey Supreme Court, state administrative bodies, and state administrative regulations have undertaken no such reading; instead they slavishly adhere to the statute's plain language. Thus there can be no realistic expectation that New Jersey will interpret the Fee Amendments to conform to *Hudson*.[65]

In addition, the Fee Amendments as interpreted require the employees to take their statutory challenges to two different administrative forums, one for demand and return scheme structural defects, and another for challenges to expenditures. Thus, abstention in this case relegates employees' claims to *multiple* state *administrative bodies*; for the state courts themselves "transfer" issues such as these to state agencies.[66] Under state law and practice then, employees cannot obtain an expeditious state *court* determination of their rights, but must proceed to administrative bodies.[67]

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[65] The statutory scheme then is not "fairly subject to" a saving interpretation and *Pullman* abstention is unjustified. Hawaii Housing Authority v. Midkiff, 104 S. Ct. 2321, 2327 (1984).

[66] In Baylis v. Shapiro, Superior Court of New Jersey, Chancery Division Essex County, Docket No. C-2338-84, the court transferred representation fee statutory issues to the Public Employment Relations Commission (Order of October 23, 1984). The employees' burden of "piecemeal adjudication" was rejected by this Court in Baggett v. Bullitt, 377 U.S. 360, 378-79 (1964). See also, Frederick L. v. Thomas, 557 F.2d 373, 383 (3d Cir. 1977).

[67] The employees' burden of presenting their § 1983 claims to state administrative bodies was rejected by this Court in Gibson v. Berryhill, 411 U.S. 564, 574 (1973).

And state administrative proceedings are anything but prompt. For example, Thomas Gay initiated a claim before the Public Employment Relations Commission by letter of February 12, 1982. That case was resolved by settlement, while still pending before the administrative agency in January of 1987, almost five years later. Certainly this is not the expeditious determination required by *Hudson*.

Even leaving *Hudson* to one side, the decision below to abstain in the circumstances of this case cannot be squared with precedents of this Court. This Court's decisions disfavor abstention;[68] hold that probable delays militate against abstention, especially where there is no certification procedure;[69] do not relegate claimants to administrative bodies; and do not deny a federal forum for Civil Rights Act claims.[70] And no case of this Court sanctions abstention so far after the passage of time and record development as has occurred here. For these reasons the decision below to abstain violates *Hudson's* demand for an expeditious hearing *and* the abstention precedents of this Court.

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[68] The proper application of *Pullman* is confined to "narrowly limited 'special circumstances'." Kusper v. Pontikes, 414 U.S. 51, 55 (1973).

[69] In cases where state law is not fixed, as it is here, this Court has *sua sponte* certified questions to a state's highest court in recognition of the harm delay causes. Elkins v. Moreno, 435 U.S. 647, 667 (1978).

[70] *Gibson*, supra, n. 67. See also, Califano v. Sanders, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.")

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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